

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 4:93CR14WS
PAUL B. CLARK,	)	
	)	
Defendant.	)	

UNITED STATES' PROPOSED JURY INSTRUCTIONS

Respectfully submitted,

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Table of Contents  
Requested Jury Instructions

Request Page  
No.

1. Preliminary Instruction Before Trial . . . . .	1
(Short Form)	
2. Note-Taking By Jurors Optional Additional . . . . .	4
To Preliminary Instruction (Alternative A)	
3. Court's Instructions To The Jury At . . . . .	5
Conclusion of Trial	
4. Duty To Follow Instructions . . . . .	6
5. Presumption Of Innocence--Burden Of . . . . .	7
Proof--Reasonable Doubt	
6. Evidence-Excluding Argument Of . . . . .	8
Counsel And Comment Of Court	
7. Evidence-Inferences-Direct And . . . . .	9
Circumstantial (Alternative B)	
8. Credibility Of Witnesses . . . . .	10
9. Impeachment By Prior Inconsistencies . . . . .	12
10. Impeachment By Prior Conviction . . . . .	13
(Witness Other Than Defendant)	
11. Caution--Punishment . . . . .	14
12. Purpose And Summary Of Sherman Act Section 1 . . . . .	15
13. Caution -- Consider Only Crime Charged . . . . .	17
14. Offense Charged . . . . .	18
15. Offense - Essential Elements Of . . . . .	20
The Sherman Act Offense	

(I)

Request  
Page No.

16. Sherman Act - Conspiracy Defined . . . . .	22
17. Membership In A Conspiracy . . . . .	25
18. Bid Rigging Per Se Unreasonable . . . . .	27
19. Knowledge And Intent . . . . .	30
20. Interstate Commerce . . . . .	32
21. Offense - Statute of Limitations . . . . .	35
22. Offense - Exact Date Not Required . . . . .	37
23. Offense - Success Immaterial . . . . .	38
24. Proof Of Overt Act Unnecessary . . . . .	40
25. Offense - Good Motives Immaterial . . . . .	41
26. Jurisdiction And Venue . . . . .	42
27. Witnesses - Immunity And Plea Agreements . . . . .	43
28. Duty to Deliberate - Verdict Form . . . . .	45

Government's  
Request No. 1

PRELIMINARY INSTRUCTION BEFORE TRIAL (SHORT FORM)

Members of the Jury:

You have now been sworn as the jury to try this case. By your verdict you will decide the disputed issues of fact. I will decide all questions of law that arise during the trial and, before you return to deliberate together and decide the case at the end of the trial, I will instruct you on the rules of law that you must follow in reaching your decision.

Because you will be called upon to decide the facts of the case, you should give careful attention to the evidence presented for your consideration during the trial, but you should keep an open mind and should not form or state any opinion about the case until you have heard all of the evidence, the closing arguments of the lawyers, and my instructions to you on the applicable law.

During the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence. Insofar as the lawyers are concerned, as well as others whom you recognize as having some connection with the case, you are instructed that, in order to avoid even the appearance of impropriety, you should have no conversation whatsoever with those persons while you are serving on the jury.

You must also avoid reading any newspaper articles that

might be published about the case now that the trial has begun, and you must also avoid listening to or observing any television or radio news programs because of the possibility that some mention might be made of the case.

The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case only on the basis of the evidence presented during the trial without consideration of any other matters.

[If desired, insert here instruction on note-taking by jurors, charge no. 2.]

During the trial I may be called upon to rule on motions or objections made by the lawyers. You should not infer from any ruling I may make that I have any opinions on the merits of the case favoring one side or the other. If I sustain an objection to a question that goes unanswered by the witness, you should not speculate on what answer might have been given, nor should you draw any inferences from the question itself.

During the trial it may be necessary for me to confer with the lawyers out of your hearing concerning questions of law or procedure that require consideration by the Court alone. On some occasions you may be excused from the courtroom as a convenience to you and to us while I discuss such matters with the lawyers. I will try to limit these interruptions as much as possible, but you should remember at all times the importance of the matter you are here to determine and should be patient even though the case

may seem to go slowly.

Now, we will begin by affording the lawyers for each side an opportunity to make opening statements to you in which they may explain the issues in the case and summarize the evidence that they expect will be presented to you. After all the evidence has been presented, the lawyers will then be given another opportunity to address you and make their summations or final arguments in the case. The statements that the lawyers make now, as well as the arguments they present at the end of the trial, are not to be considered by you either as evidence in the case, which comes only from the witnesses and exhibits, or as your instruction on the law, which will come only from me. These statements and arguments are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for the purpose of making an opening statement.

Authority

General and Preliminary Instruction 1.02, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (pp. 9-11).

Government's  
Request No. 2

NOTE-TAKING BY JURORS OPTIONAL ADDITIONAL  
TO PRELIMINARY INSTRUCTION (ALTERNATIVE A)

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Furthermore, in a group the size of yours, certain persons will take better notes than others, and there is the risk that the jurors who do not take good notes will depend upon the jurors who do take good notes. The jury system depends upon all twelve jurors paying close attention and arriving at a unanimous decision. I believe that the jury system works better when the jurors do not take notes.

You will note that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

Authority

General and Preliminary Instruction 1.03, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 12).

Government's  
Request No. 3

COURT'S INSTRUCTIONS TO THE JURY  
AT CONCLUSION OF TRIAL

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

Authority

General and Preliminary Instruction 1.04, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 14).



Government's  
Request No. 4

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened--that is, in reaching your decision as to the facts--it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

Authority

General and Preliminary Instruction 1.05, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 15).

Government's  
Request No. 5

PRESUMPTION OF INNOCENCE--BURDEN  
OF PROOF--REASONABLE DOUBT

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify]. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Authority

General and Preliminary Instruction 1.06, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 16).  
[Delete bracketed material if defendant testifies.]

Government's  
Request No. 6

EVIDENCE--EXCLUDING ARGUMENT OF COUNSEL  
AND COMMENT OF COURT

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

Authority

General and Preliminary Instruction 1.07, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 18).

Government's  
Request No. 7

EVIDENCE--INFERENCES--DIRECT AND CIRCUMSTANTIAL  
(ALTERNATIVE B)

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Authority

General and Preliminary Instruction 1.08, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 19).

Government's  
Request No. 8

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses [including the defendant] who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

Authority

General and Preliminary Instruction 1.09, Pattern Jury Instr., Crim., 5th Cir. 1990 (p. 20).

[Delete bracketed material if defendant does not testify.]

Government's  
Request No. 9

IMPEACHMENT BY PRIOR INCONSISTENCIES

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

I remind you that a defendant has the right not to testify. When the defendant does testify, however, his testimony should be weighed and his credibility evaluated in the same way as that of any other witness.

Authority

General and Preliminary Instruction 1.11, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 22).

Government's  
Request No. 10

IMPEACHMENT BY PRIOR CONVICTION  
(WITNESS OTHER THAN DEFENDANT)

You have been told that the witness \_\_\_\_\_ was convicted in \_\_\_\_\_ of conspiring to rig dairy bids submitted to certain public schools in Mississippi. A conviction is a factor you may consider in deciding whether to believe that witness, but it does not necessarily destroy the witness's credibility. It has been brought to your attention only because you may wish to consider it when you decide whether you believe the witness's testimony.

Authority

General and Preliminary Instruction 1.12, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 23).



Government's  
Request No. 11

CAUTION--PUNISHMENT

If the defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

Authority

General and Preliminary Instruction 1.21, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 32).

Government's  
Request No. 12

PURPOSE AND SUMMARY OF SHERMAN ACT SECTION 1

The indictment charges that the defendant violated a law of the United States known as the Sherman Act. The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or monopolization of any business or industry, so that the consuming public may receive better goods and services at a lower cost.

Section 1 of the Sherman Act provides in relevant part that: "Every contract, combination . . . or conspiracy, in restraint of trade . . . among the several States . . . is . . . illegal."

So, any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade and commerce, constitutes an unreasonable restraint of interstate trade, and is in itself unlawful; and, if knowingly done, is a federal offense under Section 1 of the Sherman Act.

### Authority

Devitt & Blackmar, Federal Jury Practice and Instructions,  
Section 51A.03 (4th ed. Supp. 1993), and cases cited therein.

National Soc'y of Professional Bldg. Eng'rs v. United States, 435  
U.S. 679, 694-95, 98 S. Ct. 1355, 1366-67 (1978).

United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct.  
377, 379, 396-97 (1927).

15 U.S.C. § 1.

Government's  
Request No. 13

CAUTION--CONSIDER ONLY CRIME CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case.

Authority

General and Preliminary Instruction 1.20, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (p. 31).

Government's  
Request No. 14

OFFENSE CHARGED

A federal grand jury returned an indictment charging that beginning at least as early as 1977 and continuing thereafter at least through August 1988, the exact dates being unknown to the grand jury, the defendant and others formed, joined and participated in a continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in the dairy products business in eastern Mississippi in violation of Title 15, Section 1 of the United States Code, commonly known as the "Sherman Act."

The grand jury further charged that the combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and his co-conspirators, the substantial terms of which were to rig or agree upon the bids submitted to certain schools and other institutions in eastern Mississippi by:

- (a) discussing among themselves the submission of prospective bids to certain public schools in eastern Mississippi;
- (b) agreeing upon and designating which corporate conspirator would be the low, responsive bidder for contracts to supply dairy products to certain public schools in eastern Mississippi;
- (c) agreeing upon bid prices or approximate bid prices for contracts to supply dairy products to certain public schools in eastern Mississippi;

- (d) having each corporate conspirator submit bids, or refrain from submitting bids, for contracts to supply dairy products to certain public schools in eastern Mississippi in accordance with the collusive and noncompetitive agreement;
- (e) accepting the award of contracts to supply dairy products to certain public schools in eastern Mississippi pursuant to collusive, noncompetitive, and rigged bids;
- (f) supplying dairy products to certain public schools in eastern Mississippi pursuant to contracts awarded on the basis of collusive, noncompetitive, and rigged bids; and
- (g) accepting payment for the supply of dairy products to certain public schools in eastern Mississippi pursuant to contracts awarded on the basis of collusive, noncompetitive, and rigged bids.

Authority

Devitt & Blackmar, Federal Jury Practice and Instructions,  
Section 51A.01 (4th ed. Supp. 1993), and cases cited therein.

Indictment ¶ 4.

Government's  
Request No. 15

OFFENSE - ESSENTIAL ELEMENTS OF THE SHERMAN ACT OFFENSE

Three essential elements must be proved to establish the offense charged in the grand jury's indictment:

- First: That the conspiracy as described in the indictment was knowingly formed and was existing at or about the time alleged;
- Second: That the defendant knowingly became a member of the conspiracy as charged; and
- Third: That the alleged conspiracy restrained interstate trade or commerce.

If you find beyond a reasonable doubt, from the evidence in the case, that the existence of the conspiracy charged in the indictment has been proved, then the conspiracy-offense charged is complete, regardless of whether the defendant knowingly became a member at the beginning of the conspiracy, or afterwards during the continuance of the conspiracy, if you also find beyond a reasonable doubt from the evidence that the trade or commerce restrained by such conspiracy was interstate in nature.

Authority

Devitt and Blackmar, Federal Jury Practice and Instructions, Sections 51A.15, 51A.19 (4th ed. Supp. 1993), and cases cited therein.

Pinkerton v. United States, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 1183-84 (1946).

United States v. All Star Indus., 962 F.2d 465, 474-75 (5th Cir.), cert. denied, 113 S. Ct. 377 (1992).

United States v. Alvarez, 625 F.2d 1196, 1198 (5th Cir. 1980),

cert. denied, 451 U.S. 938, 101 S. Ct. 2017 (1981).

United States v. Beechum, 582 F.2d 898, 913 n.16 (5th Cir. 1978), cert. denied, 440 U.S. 920, 99 S. Ct. 1244 (1979).

United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1082-83 (5th Cir.), cert. denied, 437 U.S. 903, 98 S. Ct. 3088 (1978).



SHERMAN ACT - CONSPIRACY DEFINED

The first element requires the government to prove the existence of a conspiracy, and I will now define the term conspiracy for you.

A criminal conspiracy is an agreement between two or more persons to join together to accomplish some unlawful purpose. So, a conspiracy is a kind of "partnership in crime," in which each member becomes the agent of every other member.

To constitute such an agreement or conspiracy, it is not necessary that the participants meet together at the same time or at the same place, or even that they meet at all, nor is it necessary that all parties be present or participate in every act committed for the accomplishment or furtherance of the objects of the conspiracy. Neither is it necessary that any formal or express contract or agreement be made between them and it need not be reduced to writing. To prove such an agreement or understanding it is not necessary for the government to show that the parties met and formally agreed what to do. It is sufficient if the parties reached a mutual understanding by any means or in any manner, whether express or implied, so long as it appears, beyond a reasonable doubt that such an understanding existed to pursue a common and unlawful plan.

A conspiracy or agreement to violate the law, like any other

kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

The government must prove that the defendant and at least one competitor knowingly arrived at some type of agreement or understanding that they, and perhaps others, would submit rigged dairy bids to school boards by means of some common plan or course of action as alleged in the indictment. The government need not prove, however, that the conspiracy as alleged was actually carried out. The bid-rigging agreement itself is the crime.

#### Authority

Substantive Offense Instruction 2.21, Pattern Jury Instr., Crim., 5th Cir. 1990 (pp. 89-90).

Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1847 (1991).

United States v. General Motors Corp., 384 U.S. 127, 142-43 86 S. Ct. 1321, 1329 (1966).

United States v. Singer Mfg. Co., 374 U.S. 174, 194-95, 83 S. Ct. 1733, 1784 (1963).

American Tobacco Co. v. United States, 328 U.S. 781, 809-10, 66 S. Ct. 1125, 1139 (1946).

United States v. Pinkerton, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 1183-84 (1946).

Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 458, 60 S. Ct. 618, 626 (1940).

Nash v. United States, 229 U.S. 373, 378, 33 S. Ct. 780, 782 (1913).

United States v. MMR Corp., 907 F.2d 489, 495 (5th Cir. 1990) cert. denied, 499 U.S. 936, 111 S. Ct. 1388 (1991).

United States v. Gravelly, 840 F.2d 1156, 1161 (4th Cir. 1988).

United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979).

United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977).

Government's  
Request No. 17

MEMBERSHIP IN A CONSPIRACY

In order to convict the defendant, you must determine both that there was a conspiracy as charged in the indictment and that the defendant was a member of that conspiracy. Before you may find that the defendant became a member of the conspiracy charged, the evidence must show beyond a reasonable doubt that the defendant knowingly participated in the conspiracy, with the intent to further or advance some object or purpose of the conspiracy.

However, one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the identities of all the other alleged conspirators. It is not necessary that all the conspirators meet together or that each member of the conspiracy know every other member or the exact part which each participant is playing. A member in a conspiracy need not be an active participant in every phase of the conspiracy. Even a single act may be enough to establish membership in a conspiracy where the act is such that you may infer from it participation in the criminal enterprise.

Moreover, if you find that a conspiracy existed and that the defendant was a member of that conspiracy, then the defendant is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy or had participated

in every phase of the conspiracy. Because a conspiracy is a partnership in crime, the acts or declarations of each member of the conspiracy, in furtherance of a common objective of the conspiracy, are the acts or declarations of all, including the defendant, if you find he was a member of the conspiracy, as charged.

#### Authority

Substantive Offense Instruction 2.21, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (pp. 89-90).

Devitt & Blackmar, Federal Jury Practice and Instructions,  
Section 28.05 (4th ed. 1990).

United States v. United States Gypsum Co., 438 U.S. 422, 463 &  
n.36, 98 S. Ct. 2864, 2886 & n.36 (1978).

United States v. Pinkerton, 328 U.S. 640, 646-47, 66 S. Ct.  
1180, 1183-84 (1946).

Hitchman Coal & Coke Co. v Mitchell, 245 U.S. 229, 249-50,  
38 S. Ct. 65, 71-72 (1917).

United States v. Saavedra, 684 F.2d 1293, 1301 (9th Cir. 1982).

United States v. Watson, 669 F.2d 1374, 1379 (11th Cir. 1982).

United States v. Alvarez, 625 F.2d 1196, 1198 (5th Cir. 1980),  
cert. denied, 451 U.S. 938, 101 S. Ct. 2017 (1981).

United States v. Michel, 588 F.2d 986, 1002 (5th Cir.),  
cert. denied, 44 U.S. 825, 100 S. Ct. 47 (1979).

United States v. Consolidated Packaging Corp., 575 F.2d 117,  
126-27 (7th Cir. 1978).

Government's  
Request No. 18

BID RIGGING PER SE UNREASONABLE

Bid rigging is an agreement between two or more competitors to eliminate, reduce, or interfere with competition for a contract that is to be awarded on the basis of bids. Bid rigging may be an agreement among competitors about the prices to be bid, who should bid low, or who should bid or refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition among the bidders.

Every conspiracy to rig bids is unlawful, regardless of the motives of the parties or any economic justification. This is because the aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition.

If there was a conspiracy as charged, it does not matter whether the prices bid by the defendant and co-conspirators were reasonable or unreasonable; high or low; fair or unfair. You are not to decide whether the alleged conspiracy was wise or unwise, or speculate on the degree to which competition was restrained on the school dairy products contracts, or determine whether the alleged conspiracy increased the cost of the school dairy products. The Sherman Act makes illegal every conspiracy formed for the purpose of rigging bids. If you find beyond a reasonable doubt that the defendant was a member of a conspiracy to rig bids on school dairy products contracts, then you need not decide

whether such conspiracy was reasonable or unreasonable because, as I have just explained, an agreement among competitors not to compete for contracts by submitting rigged or agreed-upon bids is automatically unreasonable and a violation of the Sherman Act.

I further charge you that to violate the Sherman Act, conspirators do not have to agree on the exact prices they will submit. An agreement that companies will not submit independent bids is bid rigging of the simplest kind and is automatically unlawful.

If the conspiracy charged in the indictment is proved, it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all competition. Similarly, the conspiracy is unlawful even if it did not extend to all products sold by the conspirators or did not affect all of their customers.

If you find that the defendant entered into an agreement with the alleged co-conspirators to rig or agree upon dairy bids submitted to certain public schools in eastern Mississippi, the fact that they may not have followed the agreement, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense. In other words, you may find that an illegal conspiracy existed, and that the defendant joined it, even if the defendant or any co-conspirator did not actually succeed in rigging school milk bids. The agreement is the crime,

even if it was never carried out.

#### Authority

ABA Sample Instructions at pp. 19 & 153-54.

Devitt & Blackmar, Federal Jury Practice and Instructions,  
Sections 51A.13, 51A.18 (4th ed. Supp. 1993), and cases cited  
therein.

Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332,  
102 S. Ct. 2466 (1982).

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647,  
100 S. Ct. 1925 (1980).

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24,  
223-24, 60 S. Ct. 811, 844-845 (1940).

United States v. Trenton Potteries Co., 273 U.S. 392, 397,  
47 S. Ct. 377, 381 (1927).

United States v. Fischbach & Moore, Inc., 750 F.2d 1183,  
1189-90, 1192, 1196 (3d Cir. 1984), cert. denied, 470 U.S.  
1029 (1985), 105 S. Ct. 1397 (1985).

United States v. Portsmouth Paving Corp., 694 F.2d 312, 317-18  
(4th Cir. 1982).

United States v. Koppers Co., 652 F.2d 290, 293-96 (2d Cir.),  
cert. denied, 454 U.S. 1083, 102 S. Ct. 639 (1981).

United States v. Foley, 598 F.2d 1323, 1333 (4th Cir. 1979),  
cert. denied, 444 U.S. 1043, 100 S. Ct. 728 (1980).

United States v. Brighton Bldg. & Maintenance Co., 598 F.2d  
1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840,  
100 S. Ct. 79 (1979).

United States v. Cadillac Overall Supply Co., 568 F.2d 1078,  
1087-90 (5th Cir.), cert. denied, 437 U.S. 903, 98 S. Ct.  
3088 (1978).

United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977).



Government's  
Request No. 19

KNOWLEDGE AND INTENT

The crime charged in this case requires proof of intent before the defendant can be convicted. To establish the required intent, the government must prove beyond a reasonable doubt that the defendant knowingly did something which the law forbids. In this case, that means that the government must prove beyond a reasonable doubt that the defendant knowingly participated in a conspiracy to rig or agree upon dairy bids submitted to certain public schools in eastern Mississippi. The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident. It is not necessary for the government to prove that the defendant knew that the agreement, combination, or conspiracy to rig school bids is a violation of the law.

As I instructed you, a combination or conspiracy to rig bids is unreasonable and illegal as a matter of law, and, therefore, the government does not have to prove that the defendant specifically intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade.

Intent ordinarily may not be proved directly, because there is no way of directly scrutinizing the workings of the human mind. You may, however, infer the defendant's intent from the

surrounding circumstances. You may consider any statements made or acts done or omitted by the defendant as well as all other facts and circumstances received in evidence which may aid in your determination of the defendant's knowledge or intent.

#### Authority

General and Preliminary Instruction 1.35, Pattern Jury Instr., Crim., 5th Cir. 1990 (p. 49).

Devitt & Blackmar, Federal Jury Practice and Instructions, Sections 17.07, 51A.16 (4th ed. 1990 & Supp. 1993), and cases cited therein.

United States v. United States Gypsum Co., 438 U.S. 422, 444-46, 98 S. Ct. 2864, 2876 (1978).

United States v. Trenton Potteries, 273 U.S. 392, 397, 47 S. Ct. 377, 379 (1926).

United States v. All Star Indus., 962 F.2d 465, 474-75 (5th Cir.), 113 S. Ct. 377 (1992).

United States v. MMR Corp., 907 F.2d 489, 495 (5th Cir. 1990), cert. denied, 499 U.S. 936, 111 S. Ct. 1388 (1991).

United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 684 (5th Cir. 1981), cert. denied, 455 U.S. 1017, 102 S. Ct. 1712 (1982).

United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1104 (7th Cir.), cert. denied, 444 U.S. 840, 100 S. Ct. 79 (1979).

Government's  
Request No. 20

INTERSTATE COMMERCE

One element of the offense charged in the indictment is that the charged bid-rigging conspiracy was in restraint of interstate commerce. If you find beyond a reasonable doubt that the conspiracy did exist and that the defendant knowingly became a member of it, you must then determine beyond a reasonable doubt if the conspiracy was in restraint of interstate commerce.

The term "interstate" commerce involves the movement of goods and items or the conduct of transactions from one state to another in the course of business. It is a question of fact for you to determine whether the charged conspiracy was in restraint of interstate commerce. In this regard, interstate commerce is not a technical legal question, but a practical one based upon the facts establishing the manner in which a business operates.

A bid-rigging conspiracy may restrain interstate commerce in one or both of the following ways. First, a bid-rigging conspiracy may restrain interstate commerce if some aspect of the conspiracy had a direct impact on interstate business transactions. This is known as the "flow" theory of interstate commerce. As long as the government proves beyond a reasonable doubt that the charged conspiracy occurred within the flow of interstate commerce, the magnitude or dollar amount of business affected is unimportant. The second way in which interstate

commerce could be restrained is if the charged conspiracy attached directly to a purely local activity but a substantial amount or quantity of interstate commerce was affected by that local business activity. The indictment in this case charges both methods of restraint, but the evidence need only prove that one or the other occurred in order to satisfy the interstate commerce element of the offense.

#### Authority

McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242-46, 100 S. Ct. 502, 509-11 (1980).

Goldfarb v. Virginia State Bar, 421 U.S. 773, 785, 95 S. Ct. 2004, 2012 (1975).

Keifer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 212, 213-15, 71 S. Ct. 259, 259-61 (1951).

United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464, 69 S. Ct. 714, 716 (1949).

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236-238, 68 S. Ct. 996, 1006-07 (1948).

United States v. Yellow Cab Co., 332 U.S. 218, 225, 67 S. Ct. 1560, 1564 (1947).

Swift & Co. v. United States, 196 U.S. 375, 398-400, 25 S. Ct. 276, 280-81 (1905).

United States v. Georgia Waste Systems, Inc., 731 F.2d 1580, 1583 (11th Cir. 1984).

United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 679-80 (5th Cir. 1981), cert denied, 455 U.S. 1017, 102 S. Ct. 1712 (1982).

Battle v. Liberty Nat'l Life Ins. Corp., 493 F.2d 39, 47 (5th Cir. 1974), cert. denied, 419 U.S. 1110, 95 S. Ct. 784 (1975).

United States v. South Florida Asphalt Co., 329 F.2d 860, 865-68 (5th Cir.), cert. denied, 379 U.S. 880, 855 S. Ct. 149 (1964).

United States v. Standard Oil Co., 316 F.2d 884, 896, 898 (7th Cir. 1963).

Plymouth Dealers' Ass'n v. United States, 279 F.2d 128, 132 (9th Cir. 1960).

Government's  
Request No. 21

OFFENSE - STATUTE OF LIMITATIONS

Now, there is one time period that is essential, and that is the statute of limitations period for the Sherman Act offense charged in the Indictment. The grand jury returned its indictment of the defendant on July 22, 1993. The statute of limitations for this offense is five years. This means that to find the defendant guilty of violating the Sherman Antitrust Act you must find beyond a reasonable doubt that he was a member of a conspiracy that continued after July 22, 1988. In making that determination you may of course consider evidence of activity which occurred prior to July 22, 1988. It is not necessary for the government to prove that new or additional agreements were formed after July 22, 1988.

A conspiracy is a partnership in criminal purposes that continues as long as its purposes have neither been accomplished nor abandoned. All acts that intentionally furthered the goals of the conspiracy--even the act of a single conspirator, and even an act lawful by itself--are part of a conspiracy and keep it in existence.

Receiving a payment from a school district for performing a rigged school milk contract is an act in furtherance of a conspiracy, such as that charged in the indictment. Therefore, if you find that a conspiracy existed, and if you find that any

of the defendant's corporate co-conspirators received payments from a school district under a rigged contract, and that any of those payments were made on or after July 22, 1988, then you may find that the conspiracy existed within the statute of limitations.

#### Authority

Devitt & Blackmar, Federal Jury Practice and Instructions, Section 51A.20 (4th ed. Supp. 1993), and cases cited therein.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811 (1940).

United States v. Kissel, 218 U.S. 601, 608, 31 S. Ct. 124 (1910).

United States v. Dynalectric Co., 859 F.2d 1559, 1563-69 (11th Cir. 1988), cert. denied, 490 U.S. 1006, 109 S. Ct. 1641 (1989).

United States v. Northern Improvement Co., 814 F.2d 540, 541-42 (8th Cir.), cert. denied, 484 U.S. 846, 108 S. Ct. 141, (1987).

United States v. A-A-A Electric Co., 788 F.2d 242, 244-46 (4th Cir. 1986).

United States v. Girard, 744 F.2d 1170, 1172-73 (5th Cir. 1984).

Government's  
Request No. 22

OFFENSE - EXACT DATE NOT REQUIRED

You will note that the grand jury's indictment charges that the alleged conspiracy began at least as early as 1977 and continued thereafter at least through August 1988. It is not necessary that the government prove the exact dates of the conspiracy or that the conspiracy continued for the entire period charged in the indictment. It is sufficient if the evidence shows beyond a reasonable doubt that the conspiracy existed at or reasonably near the time alleged in the grand jury's indictment and that the defendant joined it sometime during the time set forth in the indictment and continued to be a member within the statute of limitations.

Authority

See General and Preliminary Instruction 1.19, Pattern Jury Instr., Crim., 5th Cir. 1990 (p. 30).

United States v. Lokey, 945 F.2d 825, 832 (5th Cir. 1991).

United States v. Bowman, 783 F.2d 1192, 1197 (5th Cir. 1986).

United States v. Cochran, 697 F.2d 600, 604 (5th Cir. 1983).



Government's  
Request No. 23

OFFENSE - SUCCESS IMMATERIAL

The success or failure of an alleged Sherman Act bid-rigging conspiracy to accomplish its objects or purposes is immaterial. The act of conspiring in violation of the Sherman Act, by agreeing to rig bids, is itself an offense, and it does not matter whether an effort was made to carry the bid-rigging conspiracy into effect, or whether the conspirators had the power to put it into effect.

In other words, you may find that the illegal conspiracy was formed even if the defendant did not actually succeed in rigging dairy bids submitted to certain public schools in eastern Mississippi. The mere forming of the agreement or understanding to try to rig bids is sufficient to violate the law.

Authority

Devitt & Blackmar, Federal Jury Practice and Instructions,  
Section 51A.19 (4th ed. Supp. 1993).

American Tobacco Co. v. United States, 328 U.S. 781, 789,  
66 S. Ct. 1125, 1129 (1946).

Associated Press v. United States, 326 U.S. 1, 12-13, 65 S. Ct.  
1416, 1421 (1945).

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-25  
& n.59, 60 S. Ct. 811, 844-46 & n.59 (1940).

United States v. Trenton Potteries Co., 273 U.S. 392, 402-03,  
47 S. Ct. 377, 381-82 (1927).

Nash v. United States, 229 U.S. 373, 378, 33 S. Ct. 780, 782  
(1913).

United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977).

Plymouth Dealers' Ass'n v. United States, 279 F.2d 128, 132  
(4th Cir. 1960).

Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 401  
(4th Cir. 1958), aff'd on other grounds, 360 U.S. 395,  
79 S. Ct. 1237 (1959).

Government's  
Request No. 24

PROOF OF OVERT ACT UNNECESSARY

The government need not show that the members of the alleged conspiracy did any act or thing to further or accomplish any object or purpose of the bid-rigging agreement or arrangement or understanding.

It is the agreement itself that is the violation. Any actions taken to carry out such a bid-rigging agreement are evidence of the existence of the agreement but are not a necessary part of the crime.

Authority

Devitt & Blackmar, Federal Jury Practice and Instructions, Section 51A.19 (4th ed. Supp. 1993), and cases cited therein.

United States v. Dynalectric Co., 859 F.2d 1559, 1564 n.6 (11th Cir. 1988) (quoting United States v. Ben M. Hogan Co., 809 F.2d 480, 482 (8th Cir.), cert. denied, 490 U.S. 1006, 108 S. Ct. 84 (1987)).

United States v. Flom, 558 F.2d 1179 (5th Cir. 1977).

United States v. Portsmouth Paving & Corp., 694 F.2d 312, 324 (4th Cir. 1982).

Government's  
Request No. 25

OFFENSE - GOOD MOTIVES IMMATERIAL

If you find beyond a reasonable doubt that the defendant conspired in restraint of interstate commerce by rigging or agreeing upon dairy bids submitted to certain public schools in eastern Mississippi, as alleged in the indictment, you need not concern yourself with his reasons for doing so. A bid-rigging conspiracy is unlawful even if it was formed or engaged in with what the conspirators thought were good motives.

A bid-rigging conspiracy, such as charged in the grand jury's indictment, cannot therefore be justified under the law, even though the conspiracy may have been formed, or engaged in, to ensure every competitor what he thinks is his fair share of the business, or to prevent excessive competition or to eliminate the supposed evils of price cutting. A bid-rigging agreement is illegal, regardless of whether the conspirators' motives were either good or bad, or both.

Authority

Devitt & Blackmar, Federal Jury Practice and Instructions,  
Section 51A.18 (4th ed. Supp. 1993), and cases cited therein.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220,  
228, 60 S. Ct. 811, 843, 846 (1940).

United States v. All Star Indus., 962 F.2d 465, 475 n.20,  
(5th Cir.), cert. denied, 113 S. Ct. 377 (1992).

Government's  
Request No. 26

JURISDICTION AND VENUE

Before you can find the defendant guilty, you must find beyond a reasonable doubt that the conspiracy was entered into, or carried out in part, or that some means, methods, or practices in furtherance of the conspiracy were employed by or under the authority of the members of the alleged conspiracy within the Eastern Division of the Southern District of Mississippi.

In that regard, I instruct you that Lauderdale County is within the Eastern Division of the Southern District of Mississippi.

Authority

Devitt & Blackmar, Federal Jury Practice and Instructions,  
Section 51A.21 (4th ed. Supp. 1993), and cases cited therein.

Government's  
Request No. 27

WITNESSES - IMMUNITY AND PLEA AGREEMENTS

In this case, the Court entered orders compelling certain witnesses to appear and to testify. Thus, the testimony of such individuals was immunized.

Also, the United States has entered into plea agreements with three dairy companies and five individuals who testified as witnesses at the trial. These witnesses agreed to plead guilty, and the plea agreements provided that the United States would bring no further criminal charges against these persons in exchange for their cooperation. Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court. The fact that an accomplice has entered a plea of guilty to the conspiracy charge is not evidence, in and of itself, of the guilt of any other person.

An alleged co-conspirator, including one who has entered into a plea agreement with the prosecution or received immunity, is a competent witness. The testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with greater care than the testimony of an ordinary witness. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt.

### Authority

General and Preliminary Instructions 1.15, 1.16, Pattern Jury Instr., Crim., 5th Cir. 1990 (pp. 26-27).

Devitt & Blackmar, Federal Jury Practice and Instructions, Sections 15.03, 15.04 (4th ed. 1992), and cases cited therein.

Caminetti v. United States, 242 U.S. 470, 495, 37 S. Ct. 192, 198 (1917).

United States v. Figurski, 545 F.2d 389, 392 (4th Cir. 1976).

Government's  
Request No. 28

DUTY TO DELIBERATE - VERDICT FORM

To reach a verdict, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges--judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.



A form of verdict has been prepared for your convenience.

[Explain verdict form.]

The foreperson will write the unanimous answer of the jury in the space provided for in each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the marshal. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

#### AUTHORITY

General and Preliminary Instruction 1.25, Pattern Jury Instr.,  
Crim., 5th Cir. 1990 (pp. 36-37).